

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

May 31, 2016

The Honorable Sylvia Burwell
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Secretary Burwell:

Since June 2015, the Committee on Energy and Commerce and the Committee on Ways and Means have sought information from your department about the implementation and source of funding of the Basic Health Program (BHP) of the Patient Protection and Affordable Care Act. At that time, and in light of a joint report issued by the Treasury Inspector General for Tax Administration (TIGTA) and the Inspector General of the Department of Health and Human Services (HHS OIG), our Committees were concerned about the manner in which the Administration was funding the BHP. Today, almost a year later, your Department has failed to provide meaningful answers to our questions. Your refusal to provide the requested documents and information raises serious concerns about the Department's willingness to be accountable for the lawful execution of laws passed by Congress.

On June 10, 2015, the Committees first wrote to you requesting documents and information about the BHP.¹ Specifically, we requested a detailed, written explanation for, and all documents relating to:

1. The Administration's decision to fund the BHP, despite the lack of an appropriation to do so;
2. The Administration's justification, including supposed legal basis, for providing such funding;

¹ Letter from the Hon. Peter Roskam and Hon. Kevin Brady, H. Comm. on Ways and Means, and Hon. Tim Murphy and Hon. Joe Pitts, H. Comm. on Energy and Commerce, to Hon. Sylvia Mathews Burwell, Sec'y, U.S. Dep't of Health and Human Services (June 10, 2015).

3. The amount, in detail, of any federal funding provided under the BHP to date; and
4. The estimated federal cost for the BHP for FY 2015 and FY 2016.²

On July 2, 2015, Assistant Secretary for Legislation Jim Esquea, along with Assistant Secretary for Legislative Affairs at the Department of Treasury Anne Wall, sent a two-page response to our request.³ Not only did your Department not provide any of the requested documents, but you also failed to answer our questions.

On July 28, 2015, your Department made Assistant Secretary for Financial Resources Ellen Murray available for a briefing on the process by which HHS developed the BHP. While Ms. Murray discussed several documents responsive to our request during her briefing, she did not bring them or provide copies to the Committees. As a significant accommodation to the Department, the Committees narrowed the original document request to the specific categories of documents Ms. Murray discussed in the briefing. This request, sent on September 21, 2015, asked the Department to produce:

1. The HHS table, dubbed by Ms. Murray as the “Big Ugly Table,” which organizes the various provisions of the ACA. **Please provide** the original version of the table, the most recent version, and all iterations and revisions of the table.
2. All requests to the Office of Management and Budget (OMB) for an apportionment of appropriated funds related in any way to the BHP. **Please provide** HHS’s request for apportionment, the SF 132, all supporting documentation and communications related to the request, as well as drafts of such apportionment requests.
3. OMB’s provision of such an apportionment. **Please provide** all documents and communications related to OMB’s consideration and granting of the request for apportionment, including, but not limited to, any written agreement(s) between HHS and OMB.
4. A memorandum of understanding (MOU) between HHS and the U.S. Department of the Treasury regarding allowing [*sic*] HHS to use a Treasury account in order to pay BHP expenses. **Please provide** this MOU and all supporting documentation, including any drafts, as well as any documents or communications discussing the request for an MOU.⁴

The Committees asked HHS to produce this subset of documents responsive to our original request by October 6, 2015.

² *Id.*

³ Letter from Jim R. Esquea, Assistant Sec’y for Legislation, U.S. Dep’t of Health and Human Services, and Anne Wall, Assistant Sec’y for Legislative Affairs, U.S. Dep’t of Treasury, to Hon. Tim Murphy (July 2, 2015).

⁴ Letter from Hon. Paul D. Ryan, Hon. Peter J. Roskam, and Hon. Kevin Brady, H. Comm. on Ways and Means, and Hon. Fred Upton, Hon. Tim Murphy, and Hon. Joe Pitts, H. Comm. on Energy and Commerce, to Hon. Sylvia Mathews Burwell (Sept. 21, 2015) (emphasis added).

On November 13, 2015, more than a month after the return date of our letter and more than five months after our first request for documents, the Department finally produced 24 pages of documents. The Department unilaterally redacted the text on many of these pages, and failed to inform the Committee of the redactions, or the basis for the redactions, when making the production.

On December 3, 2015, the Committees wrote to you expressing disappointment in the 24 pages of documents produced by the Department. After receiving no response to this letter, we wrote to you a fourth time on January 14, 2016, urging you to produce all responsive documents to the Committees. At this time, the Committees informed you that we would consider using the compulsory process to obtain the documents if your Department did not produce them voluntarily.

On January 28, 2016, your Department made an additional production consisting entirely of publicly available documents not responsive to the Committees' request. Your Department also made the redacted documents available for staff to review *in camera* in unredacted form. Upon reviewing these materials, Committee staff found the justifications for the redactions applied by the Department to be baseless. For example, much of the material redacted by the Department was identical to other information not redacted in the same production.

On February 10, 2016, you appeared before the Committee on Ways and Means for a budget hearing.⁵ At that hearing, Subcommittee Chairman Peter Roskam asked you whether the Department would be able to provide the requested BHP documents by the end of the day. You initially stated that "my understanding is that we have turned over the documents."⁶ But after Mr. Roskam explained that the documents produced were not responsive, you responded, "I would like to follow up with staff to understand. Our staffs need to get together to understand this."⁷ Despite Mr. Roskam's request, the Committees did not receive any documents that day or in the following weeks. Further, despite efforts by our staffs, your staff refused to discuss the document production.

On February 24, 2016, you then appeared before the Committee on Energy and Commerce for a budget hearing.⁸ At that hearing, Subcommittee Chairman Ed Whitfield asked you "[w]ill you all work with us to provide this information [about the Basic Health Program] that the staffs are asking for?"⁹ You responded that "I think we are and continue to work. We have been responsive in terms of letters."¹⁰ And again, after Mr. Whitfield stated that "you said that you will continue to work with our committee on it," you reiterated that "we will."¹¹ Despite your assurances, the Department did not work with the Committees.

⁵ H. Comm. on Ways & Means, *Hearing on the President's FY 2017 Budget Proposal with HHS*, 114th Cong. (Feb. 10, 2016).

⁶ *Id.*

⁷ *Id.*

⁸ H. Comm. on Energy & Commerce, *Hearing on the Fiscal Year 2017 HHS Budget*, 114th Cong. (Feb. 24, 2016).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

Given the Department's refusal to voluntarily produce the required materials over nine months, on March 29, 2016, our Committees each served you a subpoena for documents related to the Basic Health Program. As a significant accommodation to the Department, our subpoenas called for the Department to produce the Committees' narrowed request for documents, and not the full scope of documents responsive to our original request. These subpoenas created a legal obligation on the Department to produce all responsive materials.


Since the subpoenas have been issued, however, your Department has produced only one heavily redacted page of one document. Your Department has not asserted any valid legal privilege—presuming there is a basis for such privilege—on which the Department may withhold information from Congress. The Committees do not believe there are any valid legal privileges in this instance. Your Department has further failed to provide a log identifying the documents or portions of documents withheld from the Committee, as required by the instructions accompanying the subpoena. Subpoena instruction 11 requires, in part:

In the event that a document or part of any document is withheld on any basis, provide the following information concerning each and every such document or part of any such document withheld from production: (a) the reason the document is not being produced; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of author and addressee to each other.¹²

It is inconceivable that there are no other documents responsive to the request. We remind you that the subpoenas legally require you, as Secretary of the Department, to either produce all responsive documents or provide a thorough explanation for all information withheld from the United States Congress. The pattern of conduct to this point suggests that the Department intends to frustrate our legitimate efforts to conduct oversight of the Basic Health Program. We sincerely hope that is not the case, and ask accordingly that you immediately produce all documents responsive to our subpoenas.

If you have any questions about this matter, please contact Tegan Gelfand and Meinan Goto of the Committee on Ways and Means staff at (202) 225-5522 and Jessica Donlon of the Committee on Energy and Commerce staff at (202) 225-5074.

Sincerely,



Fred Upton
Chairman
Committee on Energy and Commerce



Kevin Brady
Chairman
Committee on Ways and Means

¹² Subpoena issued to Hon. Sylvia Burwell, Sec'y, U.S. Dep't of Health & Human Serv., from the Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce (Mar. 29, 2016).

Letter to The Honorable Sylvia Burwell

Page 5

cc: The Honorable Frank Pallone, Jr., Ranking Member
Committee on Energy and Commerce

The Honorable Sander Levin, Ranking Member
Committee on Ways and Means